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SUPREME COURT OF THE UNITED

STATES

OCTOBER TERM, 1942

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No. 861

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LEWIS W. GILBERT,

*Petitioner,*

*vs.*

GENERAL MOTORS CORPORATION.

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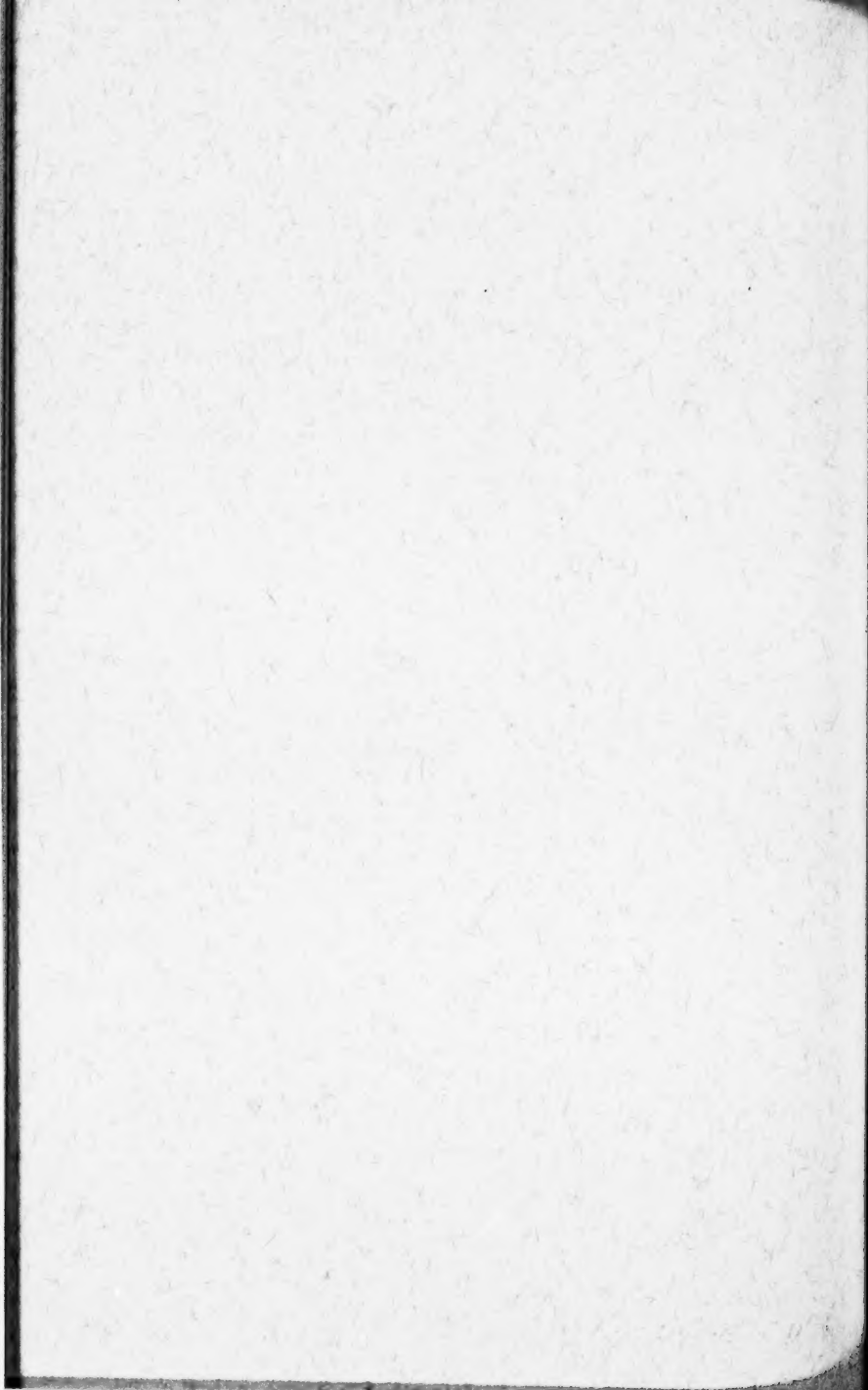
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.

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**No. 861**

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GENERAL MOTORS CORPORATION.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.**

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Lewis W. Gilbert, a resident of the Village of Limestone, in the County of Cattaraugus, State of New York (hereinafter called the plaintiff) prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on the fifth day of March 1943, which affirmed a certain decree of the United States District Court for the Western District of New York, entered on the 14th day of October, 1941, dismissing the amended complaint herein upon the merits.

**Opinions Below.**

The opinion of the District Court (R. 32) is reported 41 F. Supp. 525. The opinion of the Circuit Court of Appeals (R. 861) is not yet reported.

### Jurisdiction.

The decree of the Circuit Court of Appeals was entered March 5, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### Questions Presented.

1. Does the submission by an inventor, in confidence, of his invention, to a manufacturer make the latter a trustee for the former, in relation to the invention confidentially disclosed?

2. In the event of such submission does the production by the manufacturer within a short time thereafter, of an article embodying the principles of the invention so submitted, cast upon the latter the burden of proving independent invention, or upon the inventor of proving the contrary?

3. Shall the standard of fidelity and loyalty of a trustee, once established for this Court by Mr. Justice Holmes (*Du-pont* case), and for State Courts by Judge, later Mr. Justice Cardozo, remain as so established, or be lowered by United States Circuit Courts of Appeals?

4. Shall the construction placed upon Rule 36-a of the Federal Rules of Civil Procedure by the United States Circuit Court of Appeals in this case (the *unless* clause especially) now be adopted as correct in the face of prior decisions of this Court directly in conflict therewith, as well as of such decisions in conflict therewith by the Circuit Court of Appeals in other Circuits, and of such decisions in conflict therewith by the highest Courts of the several States?

5. Does not the frequent use of this "unless" clause, not only in Rule 36-a, but in others of the Federal Rules of Civil Procedure (twenty-eight times in all) require that its

meaning, whenever so used, be finally and judicially declared by this Court?

6. On the record in this case is the decision of the Circuit Court of Appeals to the effect that there is no interference in fact between the devices of the plaintiff and the defendant supported by any substantial evidence?

7. Upon the record in this case should the Circuit Court of Appeals have affirmed the decree of the District Court?

### **Statutes and Rules Involved.**

The only Rule directly involved is Rule 36 a, of the Federal Rules of Civil Procedure. It provides as follows:

#### **36 (a) Admission of Facts and of Genuineness of Documents**

**Request for Admission.** At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters.

Indirectly involved is the construction of Rules 5, 6, 7, 8 b, 12 a, 26 b, 26 d (3), 30 e, 32 b, 32 c (1), 32 c (2), 32 a (3), 32 d, 33, 37 c, 39, 40 a (2), 40 b, 54 d, 55, 58, 61, 65 b, 67 c and

80 c. Indirectly involved also is the construction of many statutes, including the Selective Service Act of 1940, and the Internal Revenue Code.

### **Statement.**

This is a suit by the petitioner to charge the respondent as trustee ex maleficio for the plaintiff of an unpatented invention submitted by the plaintiff in confidence and fraudulently appropriated by it. Federal jurisdiction is based upon diversity of citizenship. The District Court (W. D. N. Y.) found that there was no appropriation, and dismissed the complaint (R. 861, 39-47 incl.). The Circuit Court of Appeals affirmed (R. 861-870). Both Courts held, inferentially at least, that the burden was on the plaintiff—after proving the submission in confidence also to prove the appropriation (R. 42 h, 864-865). Both Courts held further that defendant's device was invented by one Dyer, an engineer in its employ, although Dyer nowhere says so, and that he was aided by an inspection of two other submissions to defendant, one by one Collins (R. 43, 865-866), although Dyer nowhere says so, the other by one Kauffman (R. 46, finding 20, R. 866), although Dyer nowhere says so. To reach this conclusion both Courts apparently ignored the effect of plaintiff's first submission to defendant at Rochester, N. Y., on September 10, 1931, although finding (R. 41, p (a), 864) on ample evidence (R. 864, 365) that it was made.

Both Courts found that the plaintiff's device and the Dyer device were essentially different in construction and operation (R. 39-41, 866), in the face of the claim made by Dyer in an interference in the Patent Office (No. 68,678); (R. 16, 17) to which petitioner was a party, in which Dyer asserted, under oath (R. 17, fol. 51 Patent Office Rule 93 following Section 88 of Title 35 U. S. C. A. at page 729, *ibid.* form 32 page 781) that the two devices were essentially



similar, the essential features of similarity being embodied in the count or claim of the interference, set out in full in paragraph "Ninth" of the amended complaint (R. 4, 16, paragraph 15). This finding was also made in the face of the fact, demonstrable by a slight examination of the two devices submitted (Exhibits 3, 4, 7, 39, 40) handed up herewith; that if the elements contained in the claim or count of the interference (No. 68,678) were taken away from either of these devices, neither would be operable.

Defendant's mainstay on the trial was the testimony of Dyer, in many vital instances wholly uncorroborated, both as to independent invention and essential difference, or non interference in fact (R. 578-522); and both Courts have made vital findings based upon this uncorroborated testimony (Finding 11, R. 44, 793).<sup>1</sup>

Prior to the trial plaintiff served upon defendant's counsel, pursuant to Rule 36 a, Federal Rules of Civil Procedure, certain requests for admissions. Responses were served, but they were not under oath. On the trial plaintiff introduced these requests for admissions in evidence (R. 259) together with admission of service (R. 259, 628). These were admitted without objection. They are found in the record at pages 619 to 627. The defendant did not offer the unverified responses. The trial court evidently overlooked the effect of these admissions, for no comment thereon appears in his opinion. After the record was stipulated on appeal (R. 851) defendant made a motion in the Circuit Court of Appeals to add its unverified responses to the record. The motion papers precede the opinion in the copies furnished for use in this Court. This motion was

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<sup>1</sup> 1. The Circuit Court of Appeals (R. 865-866) has found that Dyer had the benefit of the devices submitted by Collins and Kauffman and perfected them. This necessarily implies a finding that Dyer's preliminary statement under oath in the interference, and his inventor's oath (Title 35 Section 35 U. S. C. Patent Office Rules 46-48) were both untrue.

denied as unnecessary (opinion p. 870) the Court holding that before the plaintiff could take advantage of defendant's failure to comply with the rule, he must prove such failure on the trial. The Court further held that if the "requests" were to be treated as admissions the plaintiff should prevail (last page of opinion). To deny to the plaintiff the benefit of this Rule, the Court was obliged to place upon the "unless" clause therein a construction which appears to be unique.

### **Specification of Errors To Be Urged.**

The Court below erred:

1. In holding that there was no evidence that Findley, the engineer of defendant at Rochester, New York, to whom plaintiff's device was submitted in confidence, informed other employes of the defendant of the essentials of the device so disclosed.

2. In holding that such submission, so made, failed to create a confidential relation, so as to make the defendant a trustee for the plaintiff in respect thereto.

3. In holding that the burden of proof was upon the plaintiff to establish that the defendant appropriated the ideas disclosed by such device and submission, instead of upon the defendant to show that it did not.

4. In holding that there was substantial evidence to support the finding of the trial Court that the two devices are so essentially unlike that one could not have been copied from the other.

5. In holding (a) that there was substantial evidence to support the findings of the trial Court to the effect that Dyer invented the defendant's switch (Defendant's Exhibit A 17, R. 647, introduced in evidence R. 387; Plaintiff's physical Exhibit 39 handed up herewith), and (b) that in so

doing Dyer had the benefit of the submissions of Collins and Kauffman.

6. In holding, as a matter of law, that there was no interference in fact between the two devices.

7. In holding that the assignment by Lachappelle of his patent application to the defendant in December 1936 (R. 559, introduced R. 545) is a complete defense to this action.

8. In holding that Rule 36 a, Federal Rules of Civil Procedure (the *unless* clause), is not self executing and automatic, and casts upon the party serving the requests the burden of establishing, upon the trial, non compliance by the party served.

9. In affirming the decree appealed from.

### **Reasons for Granting the Writ.**

1. The decision in this case is in direct conflict with *Hoeltke v. C. M. Kemp Mfg. Co.*, 80 Fed. (2nd) 912, 923 Fourth Circuit, cert. denied 298 U. S. 673.

In *Hoeltke v. Kemp*, supra, the Fourth Circuit held that when a submission is made, as in the case at bar, by an inventor to a manufacturer, and the latter proceeds thereafter to manufacture articles of similar character, the latter, when called to account, must, if he asserts that he is using his own ideas, and not the ideas imparted to him by the inventor, prove his contention by evidence clear, convincing and beyond a reasonable doubt. In that case the unsuccessful defendant petitioned for a writ of certiorari. The four large motor companies, Ford, Packard, Chrysler and General Motors, asked leave to file a brief as amici curiae. Their brief in support of this motion urged that the Circuit Court was in error in holding that the submission created (a) relation of trust and confidence, (b)

that a failure of the manufacturer to disclose, at the time of the submission, its own development work along similar lines raised a presumption of bad faith and fraud, and (c) that such a manufacturer has the heavy burden of proving its innocence of fraudulently appropriating the invention submitted. This motion to intervene was denied (298 U. S. 672), and the petition for certiorari was also denied (298 U. S. 673). In the case at bar Dyer, defendant's mainstay, nowhere testified that he did not have any communication from Findley, defendant's engineer at Rochester, New York, between September 10, 1931, the date of the submission to the latter (R. 41, finding 6) and September 29, 1931, the date of the appearance of Exhibit A 17 (R. 643, int. R. 387). Nor was any supporting testimony given by any of the other engineers at defendant's plant at Anderson, Indiana. It must be remembered that Dyer in this suit is swearing that the two devices are essentially different, whereas in interference 68,678 he swore they were essentially the same. Irrespective of the rule requiring corroboration in patent cases, Dyer's testimony would seem to be valueless.

2. Both courts below held that there was no evidence that Findley communicated the result of his examination on September 10, 1931 to any of his associates (R. 42 h, R. 864, opinion CCA).

This ruling is also in direct conflict, not only with *Hoeltke v. C. M. Kemp Mfg. Co.*, but with *Orange Crush Co. v. American Ornamental Co.*, 60 Fed. (2nd) 518, 520, CCA 4, and with the principle of *Adamson v. Gilliland*, 242 U. S. 350. "The similarity of defendant's device to that of the plaintiff is strong proof that one was copied from the other" (*Hoeltke v. Kemp*, supra).

This ruling is also in substantial conflict with the following decisions of this Court and of other Circuits, both as

to the creation of the trust relationship and the burden of proof:

*Chesapeake & Ohio Rwy. Co. v. Kaltenbach*, 96 Fed. (2nd) 301, 306, CCA 4.

*Booth v. Stutz Motor Car Co.*, 56 Fed. (2nd) 962, CCA 7.

*Becker v. Contour Laboratories*, 29 Fed. (2nd), 31, 279 U. S. 358.

*Allen Qualley Co. v. Shellmar Products Co.*, 31 Fed. (2nd) 293, 296, *affd.* 36 Fed. (2nd), 623, CCA 7.

*DuPont v. Masland*, 244 U. S. 100.

3. The court below found that there was substantial evidence to support its statement that Dyer adopted and adapted the switches of Collins and Kauffman to perfect A 17. Dyer makes no such assertion. It was taken bodily as true from the brief of defense counsel, and is not only unsupported by any evidence whatever, but is contradicted by defendant's own documentary evidence.

Collins submitted his device (drawing and specifications) to defendant on February 2, 1931 (Defendant's Exhibits C 3, C 4, R. 675, 677, introduced R. 441). On April 24, 1931 defendant's New Devices Committee returned these to Collins with the usual letter of condolence, (Exhibit C 11, R. 685, introduced 441). They were again returned on October 10, 1931 (C 18, R. 693, introduced R. 441) and are shown in the drawings on pages 715, 716 and 717 of the record (introduced R. 441). *They do not disclose the central helical spring* (2 in Dyer) which performs the important function of bringing the contact points together in plaintiff's device, as against the suction of the vacuum, and of bringing the contact points into the same plane in the Dyer device, as against the suction of the vacuum. Collins uses gravity instead of a spring.

Kauffman's device (drawings) were submitted on October 16, 1931, after A 17 appeared (Exhibit D 5, R. 738, int.

R. 489) and returned to him on March 8, 1934, having become mislaid in the meantime. (Exhibit D 6, R. 740, int. R. 489).

The suggestion that Dyer was aided by Kaufman comes alone from defense counsel, not from Dyer. Incidentally, they accuse defendant of fraudulently misappropriating Kauffman's ideas in 1931, and making a belated reparation in 1937 (R. 562, int. R. 548). The court below has found this misappropriation as a fact (opinion A. 865-866).

4. The Circuit Court of Appeals held (opinion R. 869) that the assignment of this patent application by Lachappelle to the defendant was a complete defense. An abstract of this assignment is found at page 559 (int. R. 545 (3)). It is dated December 10, 1936—more than five years after plaintiff's submission to defendant. Lachappelle later was awarded priority in interference 68,678 by default (127 Fed. (2nd) 750).

This ruling is in direct conflict with the decision of this Court (per Mr. Justice Holmes) in *DuPont de Nemours Powder Co. v. Masland*, 244 U. S. 100, and of Mr. Justice (Then Chief Judge) Cardozo, speaking for the New York State Court of Appeals in *Meinhard v. Salmon*, 249 N. Y. 458 at page 464.<sup>2</sup>

What passed by the Lachappelle assignment was the right to obtain a patent and to prosecute for infringement thereof, both probably valueless (*Cuno Engineering Corp. v. Automatic Devices Corp.* 314 U. S. 84, 90, 91). What did not pass was the right to copy plaintiff's device and to use his ideas without paying for them, or accounting for the profits from such use, at least for the period before defendant ever heard of Lachappelle (Pleadings, answer R. 18, paragraph 18).

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<sup>2</sup> It is also in conflict with *Picard v. United Aircraft Corp.*, 128 Fed. (2nd) 632, 637, C. C. A. 2.

5. Both Courts below held that there was substantial evidence that the two devices, plaintiff's and Dyer's, were so essentially different as to negative the claim of copying, or, in the language of the decision below, that there was no interference in fact. This despite the claim of Dyer of substantial identity in interference 68,678. This ruling is in conflict with the decision of this Court in *Sanitary Refrigerator Co. v. Winters* 280, U. S. 30, pp. 41, 42, the difference here being in form only. A brief comparison is unavoidable.

A. Both devices are vacuum controlled starter switches for automobiles. Gilbert's (called in the opinion below his third switch, R. 864) consists of a cylinder containing a piston. At the head of the cylinder is a contact point, which, when the piston is shoved up as far as it would go, meets another contact point inside the cylinder, closes the circuit and sets the starting motor into operation. This shoving is accomplished by the expansion of a helical spring inside the cylinder and below the piston. A tube runs from the cylinder below the piston to the intake manifold. When the engine starts the vacuum created in the intake manifold compresses the spring, pulls the contact points apart and breaks the circuit. To provide against a failure in vacuum for any cause a wire attached to the bottom of the cylinder is carried to the accelerator rod, so that the contact points cannot come together so long as the accelerator rod is depressed.<sup>3</sup>

B. Dyer substitutes a diaphragm for the cylinder, and a rod attached to the center of the diaphragm for the piston.

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<sup>3</sup> Gilbert's device is handed up with this petition. Exhibit 3 shows the device as invented in 1928 (R. 577 int. R. 72). Exhibit 7 is a replica of the device submitted to the defendant on September 10, 1931 (R. 585 int. R. 93). Exhibit 4 (R. 577 int. R. 74), is a model of Exhibits 3 and 7, constructed for the purposes of this trial, with the front cut away and a glass window inserted to disclose the operation of the parts.

These are mechanical equivalents (Kauffman R. 487, Exhibit D 8, R. 472, 2nd line of legend, int. R. 486). Above and below the diaphragm are two helical springs, designed to force the contact points into the same place. Above the diaphragm is a vacuum tube running from the intake manifold into the vacuum chamber. The suction of the vacuum moves the diaphragm, which pulls up the rod to break the contact by opening the circuit (Dyer R. 395).<sup>4</sup>

To these features, present in both devices, Dyer substituted for Gilbert's butt contact a sliding or wiping contact, by copying the mechanism found in the socket of every chain operated electric light in the country. The latter mechanism consists of a disk or wheel on which the end of the chain rides and to which it is attached, a torque spring to reverse the action of the wheel and return the chain to its original position, a clutch connecting this wheel to a ratchet shaped wheel or disk with high and low points on its circumference and an arc shaped metal leaf which touches the high points on the ratchet shaped wheel and closes the circuit. Another pull on the chain moves the ratchet shaped wheel sufficiently so that the arc shaped leaf is no longer in contact and the circuit is broken.

In the Dyer device the attachment to the accelerator rod takes the place of the chain as used in the lamp socket. The other features, clutch, torque spring, reverse movement on

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<sup>4</sup> 1. Exhibits 39 and 40, physical exhibits, introduced R. 228, are also handed up with the petition. They are defendant's Dyer Buick switches (R. 228). Windows have been cut in Exhibit 39 so that the Court can see the diaphragm and the two helical springs, one above and one below it.

2. The drawings A 13 (R. 640), A 15 (R. 641) and A 16 (R. 642), all introduced R. 387, would seem entitled to little, if any, credit as contemporary documents. They rest upon the unsupported testimony of Dyer. The witness, if any, to A 13 was not produced. The signature of W. C. Edwards appears on A 15 and A 16. He testified (R. 409 et seq.) but said nothing to corroborate Dyer. Had these been contemporary documents they would have been marked in evidence in interference 68,678, cf. A 17, R. 643.



release of the operator's hand (or foot) are all present in both.

Under these circumstances the Patent Office, in framing the count of interference 68,678, covered these apparent differences by the use of the words "control" and "controlling" (R. 4, paragraph ninth). So read, the count of interference 68,678 covers both plaintiff and Dyer.

6. The most important reason (from a public point of view) for granting the writ is to be found in the construction placed upon the "unless" clause in Rule 36.a, F. R. C. P. "*Unless* within a period designated in the request . . . the party to whom the request is directed serves . . . a sworn statement." The learned Court held that this Rule is not self-executing; in other words, that the party seeking the benefit of the Rule must prove a negative. The *unless* clause appears in twenty-seven other places in these Rules and in various statutes mentioned below. This interpretation is in direct conflict with the intent of the Rule as formulated by the American Bar Association Institute on Federal Rules. We take the liberty of quoting Professor Sunderland:<sup>5</sup>

"A very extensive discovery by way of admissions of particular facts and documents is provided for by Rule 36. Under that Rule any party may serve on any other party a request for the admission of any facts or the genuineness of any designated documents, and upon such request they will be deemed admitted, unless the party served with notice shall within ten days serve a sworn statement upon the party requesting the admission specifically denying the matters specified in

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<sup>5</sup> (Proceedings of the American Bar Association Institute July 22, 1938, page 289.

In *Smyth v. Kaufman*, 114 F. (2nd) 40 at page 42 Judge Hand cites the Proceedings of the Institute, pp. 103, 142, 263. His may be a different edition.)

the request or stating why he cannot either admit or deny them.

The usual statute or rule on admissions requires affirmative action to constitute the admission, but under this rule affirmative action is required to avoid the admission.<sup>46</sup> There must be, therefore, a sworn statement specifically denying the facts which the other party requests should be admitted or the admissions will be deemed to have taken place."

This interpretation is also in direct conflict with the interpretation placed upon similar *unless* clauses by the following authorities:

1. *Supreme Court of the United States Ex Parte Wilson*, 114 U. S. 417.

This case arose under the Fifth Amendment "unless on a presentment of indictment of a grand jury." This Court held the Amendment self-executing in the following words, (p. 426):

"The purpose of the Amendment was to limit the powers of the Legislature, as well as of the prosecuting officers, of the United States. We are not, indeed, disposed to deny that a crime, to the conviction and punishment of which Congress has super-added a disqualification to hold office, is thereby made infamous. *U. S. v. Waddell*, 112 U. S. 76, 82; S. C. ante, 35. But the constitution protecting everyone from being prosecuted, without the intervention of a grand jury, for any crime which is subject by law to an infamous punishment, no declaration of Congress is needed to secure or competent to defeat the constitutional safeguard."

*Laborde v. Ubarri*, 214 U. S. 173;

*Ex Parte Des Moines, etc.*, 103 U. S. 794, 796;

*Washingtonian Pub. Co. v. Pearson*, 306 U. S. 30, 39.

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<sup>46</sup> English Rules Under the Judicature Act (The Annual Practice 1937) O. 32, r. 4; see Rule 18.

## 2. Circuit Courts of Appeals

- CCA (4); *Shelliday v. U. S.*, 25 F. (2nd) 372;  
 CCA (2); *The Harbour Trader*, 42 F. (2nd) 858;  
 CCA (9); *Bronson v. Carter Oil Co.*, 259 F. 656, 663;  
 CCA (8); *Holmes v. Phoenix Ins. Co.*, 98 F. (2nd) 240, 241;  
 CCA (9); *Jackson v. U. S.*, 295 F. 620, reversing *U. S. v. Bostich*, 289 F. 127, 129;  
 CCA (4); *Central Trust Co. v. Chattanooga R. & C. R. Co.*, 69 F. 685, 696.

## 3. District Courts

- New York—*Kraus v. General Motors Corp.*, 29 F. Supp. 431;  
 District of Columbia—*Van Horne v. Hines*, 31 F. Supp. 346;  
 Illinois—*Hanauer v. Siegel*, 29 F. Supp. 329, cited in *Smyth v. Kaufman*, 114 F. 2nd 40, 42, supra;  
 Idaho—*U. S. v. Kidd*, 19 F. 2nd, 535, 536;  
 Kansas—*U. S. v. Humberd*, 30 F. 2nd 413, 415;  
 Tennessee—*U. S. v. One Dodge Coupe*, 13 F. 2nd, 1019;  
 Ohio—*U. S. v. One W. W. Shaw Automobile*, 272 F. 491.

## 4. State Courts

- New York—*Manning Bowman Co. v. Keenan*, 73 N. Y. 45, 56.  
 Texas—*Garlock Mercantile Co. v. Hughes Bozarth Anderson*, 180 S. W. 784, 790;  
 West Va.—*May v. Topping*, 64 S. E. 848, 849.  
 Pennsylvania—*Frank C. Snedaker & Co. v. Wayne Title & Trust Co.*, 20 Atl. (2nd) 819, 822;  
 Oklahoma—*McKee v. Grimm*, 57 Okl. 680, 157 P. 308.

The above list is not asserted to be complete. It does show general uniformity in the construction of the "unless" clause, wherever it appears in constitution, law or rule. Such construction makes the constitutional provision, the statute or the rule self-executing and automatic.

The opinion of the Circuit Court of Appeals in the case at bar is in direct conflict with this construction. It comes from a high Court and, as such, is entitled to respect and, to some extent, obedience by the District Courts. If allowed to stand, it will cause endless confusion in the bench and bar, not only as to this rule, but as to every other rule where the "unless" clause is used. A list follows:

Rule 5. *Unless* the Court otherwise orders.

Rule 6. *Unless* it is a Sunday or other legal holiday.

Rule 7. An application to the Court shall be by motion, which, *unless* made during a hearing, shall be made in writing.

Rule 8. *Unless* the pleader intends in good faith, etc.

Rule 12. (a) *Unless* the Court otherwise directs (first sentence),

*Unless* a different time is fixed by the Court.

Rule 26. *Unless* otherwise ordered by the Court.

Rule 26. (d) (3) *Unless* it appears that the absence of the witness, etc.

Rule 30. (c) The testimony shall be taken stenographically and transcribed *unless* the parties agree otherwise.

Rule 30. (e) The deposition shall be signed by the witness *unless* such examination and reading are waived by the witness and by the parties.

Rule 32. (b) *Unless* made before the taking of the deposition.

Ibid. (c) 1. *Unless* the ground of the opposition.

Ibid. (c) 2. *Unless* seasonable objection is made.

Ibid. (c) 3. Objections \* \* \* are waived *unless* served in writing.

Ibid. (d) *Unless* a motion to suppress is made.

Rule 33. *Unless* the Court \* \* \* enlarges the time.

Rule 37. (c) *Unless* the Court finds, etc.

Rule 39. The trial of all issues shall be by jury *unless* (1) the parties stipulate or (2) the Court finds, etc.

Rule 40. (a) 2. *Unless* otherwise specified, etc.

Ibid. (b) *Unless* the Court otherwise specifies.

Rule 54. (d) *Unless* the Court otherwise directs.<sup>6</sup>

Rule 55. No judgment shall be entered against an infant or incompetent person *unless* represented, etc.

Rule 58. *Unless* the Court otherwise directs.

Rule 61. *Unless* refusal to take such action.

Rule 62. *Unless* otherwise ordered by the Court.

Rule 65. (b) *Unless* it appears, etc. "*Unless* within the time so fixed the order, for good cause shown, is extended for a like period, or *unless* the party \* \* \* consents."

Rule 72. (c) *Unless* the Court fixes a different amount.

Ibid. (d) *Unless* the Court \* \* \* fixes a different amount.

Rule 80. (c) Repleading is not necessary *unless* the Court so orders.

The following are taken at random from the Revised Statutes:

*Internal Revenue Code.*

Section 3443: "(d) No overpayment of tax under this chapter shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, *unless* the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or *unless* he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund."

Title 26 U. S. C. A., Section 3443, p. 195 (53 Stat. 417).

Section 3481: "(a) 2. No delivery or transfer to a nominee shall be exempt under this paragraph *unless* such

<sup>6</sup> Certiorari was granted to provide a uniform interpretation of Rule 54 (d) in *Reconstruction Finance Corporation v. Menihan* (311 U. S. 625). This Rule contains an "unless" clause. The learned Attorney General was too sane to argue that this clause was to be construed as having other than its generally accepted meaning (312 U. S. 81).

nominee, in accordance with regulations prescribed by the Commissioner, with the approval of the Secretary, is registered with the Commissioner."

Title 26 U. S. C. A., Section 3481 (a) 2, p. 210.

Title 1 Section 1 (53 Stat. 862).

*Selective Service Act of 1940.*

Section 303: "(a) Provided further that no citizen or subject of any country who has been or who may hereafter be proclaimed by the President to be an alien enemy of the United States shall be inducted for training and service under this Act *unless* he is acceptable to the land or naval forces. \* \* \*

"Provided further that no man shall be inducted for training and service under this Act *unless* and until he is acceptable to the land or naval forces."

Section 303: "(b) Each man inducted under the provisions of subsection (a) shall serve for a training and service period of twelve consecutive months *unless* sooner discharged."

Title 50 U. S. C. A., 114, 54 Stat. 885, 55 Stat. 627, 846.

Section 521: "*Unless*, in the opinion of the Court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense."

Title 50 U. S. C. A. 148, 54 Stat. 1181.

Section 532: "(3) *Unless* upon an order of sale previously granted by the Court."

Title 50 U. S. C. A. 152, 54 Stat. 1182.

In the foregoing the sentence containing the "unless" clause would appear to be self-executing. No doubt many other illustrations might be found in the Statutes, but we limited our attention to two in every day use, not only by the judiciary but by governmental departments.

It is difficult to see how the District Courts can uniformly interpret the Rules of Civil Procedure in the face of the construction given below in this case, which must either be

blindly followed or dissented from. Since the Court below held (last page of opinion p. 869) that these requests for admissions, not answered under oath, established the plaintiff's whole case; the result to the petitioner of this emasculation of these rules can hardly be exaggerated.<sup>7</sup>

### **Summary on the Facts.**

1. Plaintiff was the first to submit to defendant a device containing all the elements described in interference 68,678 (R. 4, par. Ninth), and now an integral part of defendant's switch.

2. Dyer does not claim invention in himself, and, if he made such claim, should not be believed without corroboration, in view of his Protean capabilities as a witness.

3. Dyer could not get from Collins what Collins did not have.

4. Dyer acknowledges no indebtedness to Kauffman. Both Courts below were asked to believe, and in part did believe, that defendant stole Kauffman's ideas in 1931, lied to him about them in 1934 (Exhibit D 6, R. 740, int. R. 489) and purchased his testimony in 1936 (R. 562, 564, fols. 1690, 1691, int. R. 548, Kauffman R. 495). While possibly indicative of a state of mind, this is not true. Kauffman's submission on October 16, 1931 (Exhibit D 5, R. 738, int. R. 489) was too late. Exhibit A 17 (R. 643, int. R. 387) and Exhibits A 18 to 35 (R. 644, 645, 646, int. R. 369) had already appeared.

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<sup>7</sup> There is no suggestion in the record or otherwise that these requests were answered under oath. The defendant's plea of waiver of compliance with this rule, made to the Circuit Court of Appeals, is in itself proof of non-compliance.

### Summary of Law Involved.

1. The proposition advanced by the four large motor companies in their motion to intervene in *Hoeltke v. C. M. Kemp Mfg. Company*, supra, and rejected by this Court (298 U. S. 673), has, by the decision below in this case, become established law. The inventor is left wholly at the mercy of the manufacturer.

2. The efforts of this Court, of the Congress, of lower Federal Courts, of the American Bar Association and its Institute, to draft a simple and comprehensive set of Rules for District Courts, must, in the face of this decision, be deemed to have entirely failed if these Rules, or any of them, can be whittled away because of a desire to relieve a supposed hardship in a particular case.

### Conclusion.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

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